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Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

DANIEL REINHOLD ANTONI,
Petitioner

v.

STATE OF WASHINGTON,
Respondent

On Petition for Writ of Certiorari
To The Court Of Appeals
Of The State Of Washington

PETITION FOR WRIT OF CERTIORARI

MICHAEL J. MCMAHON, *Counsel of Record*
PAUL J. BURNS
North 1212 Washington
Suite 224
Spokane, WA 99201
(509) 327-2213
Attorneys for Petitioner

10 HPP

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's conviction of the felony crime of witness intimidation for threatening legal proceedings against a court appointed guardian ad litem following the guardian ad litem's testimony violated petitioner's rights under the First Amendment to the United States Constitution?

2. Whether the relevant sections of the Washington State Witness Intimidation Statute, RCW 9A.72.110(2) and RCW 9A.04.110(25), are unconstitutionally overbroad in violation of the First Amendment to the United States Constitution?

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OPINIONS BELOW

Petitioner seeks review of the decision of the Washington State Court of Appeals in State v. Antoni, COA No. 19158-3-III issued on September 14, 2000. The Washington State Supreme Court denied review of the Court of Appeals decision on February 6, 2001. State v. Antoni, Washington Supreme Court No. 70349-3.

JURISDICTION

On September 14, 2000, the Washington Court of Appeals affirmed petitioner's conviction on one count of witness intimidation under RCW 9A.72.110(2). State v. Antoni, COA No. 19158-3-III. Petitioner filed a Petition for Review before the Washington State Supreme Court on October 13, 2000. The Washington State Supreme Court denied the Petition for Review by Order dated February 6, 2001. State v. Antoni, Washington Supreme Court No. 70349-3.

Petitioner challenges the constitutionality of RCW 9A.72.110(2) and RCW 9A.04.110(25) under USCA Const. Amendment 1.

This court has jurisdiction to review the decision of the Washington State Court under 28 USC §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S.C.A. Const. Amendment 1:
Religious and political freedom.
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. RCW 9A.72.110(2):

...

(2) A person also is guilty of intimidating a witness if the person directs a threat to a former witness because of the witness' role in an official proceeding.

(3) As used in this section:

(a) "Threat" means:

(i) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or

(ii) Threat as defined in RCW 9A.04.110(25).

3. RCW 9A.04.110(25)
(See Appendix)

STATEMENT OF THE CASE

On October 13, 1998, the Whitman County Prosecuting Attorney filed an Amended Information charging Petitioner Daniel R. Antoni with four counts of Intimidating a Witness under RCW 9A.72.110 (Appendix 2). The charges arose out of Mr. Antoni's contacts with a court appointed guardian ad litem, and court appointed consulting experts who were involved in a divorce/custody proceeding between Petitioner and his ex-wife. Following a three day trial, the Superior Court jury convicted Mr. Antoni on Counts II and III of the Amended Information.

Count III of the Amended Information charged Antoni with Witness Intimidation under RCW 9A.72.110(2), which provides:

> A person is also guilty of intimidating a witness if the person directs a threat to a <u>former witness</u> because of the witness' role in an official proceeding. (emphasis added)

RCW 9A.72.110(3) defines the term threat:

> To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or Threat as defined in RCW 9A.04.110(25).

RCW 9A.04.110(25) provides:

> "Threat" means to communicate, directly or indirectly the intent:
>
> (a) To cause bodily injury in the future to the person threatened or to any other person;
>
> (b) To cause physical damage to the property of a person other than the actor; or
>
> (c) To subject the person threatened or any other person to physical confinement or restraint; or
>
> (d) To accuse any person of a crime or cause criminal charges to be instituted against any

person; or

(e) To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt or ridicule; or

(f) To reveal any information sought to be concealed by the person threatened; or

(g) To testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(h) To take wrongful action as an official against anyone or anything, or wrongfully withhold official action, or cause such action or withholding; or

(i) To bring about or continue a strike, boycott, or other similar collective action to obtain property which is not demanded or received for the benefit of the group which the actor purports to represent; or

(j) To do any other act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition, or personal relationships.

Count III of the Amended Information charged Mr. Antoni with Witness Intimidation under RCW 9A.72.110(2) as follows:

> That the said DANIEL REINHOLD ANTONI on or about and between the 15th day of September, 1997 and the 3rd day of June, 1998, in the County of Whitman, State of Washington, then and there being, did direct a threat to a former witness because of the witness role in an official proceeding: to-wit: threaten to commence legal action against Leslie Cloaninger, to bring full force of law against her legal practice and her, to file a bar complaint against her, report her to Attorney General office, report her to the IRS, and

> publicize asserted facts that she was a "dyke, a liar, and had received bribes as a witness"; contrary to statute in such case made and provided, to-wit: RCW 9A.72.110(2) and RCW 9A.04.110(25), and against the peace and dignity of the State of Washington.

Therefore, Antoni was charged and convicted of the felony offense of Witness Intimidation because he:

(1) threatened legal action against a court appointed guardian ad litem;

(2) threatened to file a bar complaint against the court appointed guardian ad litem;

(3) threatened to "report" the court appointed guardian ad litem to the Internal Revenue Service and to the Attorney General's Office; [1] and

(4) threatened to publicize facts questioning the guardian ad litem's sexual orientation, and alleging that she had received "bribes" as a witness.

Both by the express terms of the statute, and the facts alleged in the information (and developed in evidence at trial), Antoni's conduct which purported to constitute witness intimidation occurred after the victim/witness had already testified in an official proceeding.

Petitioner first challenged the constitutionality of RCW 9A.72.110(2) on First Amendment overbreadth grounds in a Motion for New Trial presented to the trial court following conviction. (Appendix 3). The trial court denied the Motion

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[1] There is no evidence that petitioner "threatened" to "report" the guardian ad litem to the Internal Revenue Service. The record reflects that petitioner made repeated inquiries to the guardian ad litem to ascertain her federal tax identification number for purposes of properly reporting his payments to the guardian ad litem to the Internal Revenue Service.

for New Trial and affirmed the conviction. (Appendix 4). Antoni then appealed to Division III of the Washington State Court of Appeals, and again challenged the constitutionality of RCW 9A.72.110(2) on First Amendment overbreadth grounds. The Washington appellate court rejected petitioner's overbreadth challenge and affirmed Antoni's conviction on Count III.[2] The court recognized that the expansive definition of the term "threat" in RCW 9A.04.110(25) "potentially burdens a substantial amount of protected speech because . . . it 'prohibits a wide range of communications beyond mere fighting words and other non-protected speech.'" State v. Antoni, COA No. 19158-3-III, slip. op. at 12. However, the court concluded the statute was not unconstitutionally overbroad because it is "narrowly tailored to meet a compelling governmental purpose." Id., at 14.

On October 13, 2000, Antoni filed a Petition for Review seeking review of the constitutionality of RCW 9A.72.110(2) by the Washington Supreme Court. (Appendix 6). The Washington Supreme Court denied the Petition for Review by Order dated February 6, 2001. State v. Antoni, Washington Supreme Court No. 70349-3. (Appendix 7).

Petitioner was convicted of a felony offense of witness intimidation because he threatened legal action against a court appointed guardian ad litem, threatened to report the GAL to the State Bar Association, and called her offensive names. Petitioner now asks this court to consider whether (1) his conviction under RCW 9A.72.110(2) for this conduct violated his First Amendment rights, and (2) whether RCW 9A.72.110(2) and RCW 9A.04.110(25) are unconstitutionally overbroad in violation of the First Amendment.

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[2] The appellate court reversed Antoni's conviction on Count II. That decision was not challenged at the State Supreme Court level, and is not at issue here.

REASONS FOR WRIT OF CERTIORARI

I.

PETITIONER'S CONVICTION ON THE CHARGE OF WITNESS INTIMIDATION VIOLATED HIS FIRST AMENDMENT RIGHTS. THE WASHINGTON COURTS AFFIRMATION OF THAT CONVICTION CONFLICTS WITH THIS COURT'S FIRST AMENDMENT JURISPRUDENCE.

Petitioner Antoni was convicted of the felony offense of witness intimidation because (1) he threatened to file a legal action against a court appointed guardian ad litem, and (2) he threatened to report the guardian ad litem (an attorney at law) to the Washington State Bar Association. Petitioner made both of these "threats" after the guardian ad litem had completed her report and testimony in the civil domestic proceeding to which petitioner was a party in the Washington State Superior Court. Petitioner was convicted of a crime because of what he said and what he wrote to the court appointed guardian ad litem. He was convicted of a crime because of his speech. He was convicted of a crime because he threatened to seek redress through the judicial system for a perceived wrong done to him. He was convicted of a crime because, as a disgruntled litigant, he threatened to report what he perceived as attorney misconduct to the Washington State Bar Association. Clearly, his felony conviction premised on his speech violated his rights under the First Amendment. N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). In affirming the conviction, the Washington State Court of Appeals and the Washington Supreme Court departed from long-standing and well established First Amendment law articulated by this court.

In Terminiello v. City of Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949), the court considered whether speech which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance" could be subject

to criminal prosecution consistent with the First Amendment. 69 S.Ct., at 895. In reversing the petitioner's conviction on the municipal charge of disorderly conduct, the court observed:

> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, Chaplinsky v. New Hampshire, supra, 315 U.S. at pages 571-572, 62 S.Ct. at page 769, 86 L.Ed. 1031, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. See Bridges v. California, 314 U.S. 252, 262, 62 S.Ct. 190, 193, 86 L.Ed. 192, 159 A.L.R. 1346; Craig v. Harney, 331 U.S. 367, 373, 67 S.Ct. 1249, 1253, 91 L.Ed. 1546. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

69 S.Ct., at 896.

In Watts v. United States, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969), the court considered a First Amendment challenge to the petitioner's conviction under a federal statute which criminalized "threats" against the President of the United States. The petitioner had suggested he would "take aim" at the president if he was drafted into the armed forces. He was convicted of violating a 1917 statute which prohibited

any person from "knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States." Watts, 89 S.Ct., at 1400, (quoting from 18 USC §871(a)). In a per curiam opinion, this court reversed the conviction and explained:

> But whatever the "willfulness" requirement implies, the statute initially requires the Government to prove a true "threat." We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term. For we must interpret the language Congress chose "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964).

89 S.Ct., at 1401.

In the instant case, petitioner Antoni was convicted of witness intimidation because he uttered harsh words against a court appointed guardian ad litem, threatened legal action against her, and threatened to report her to a State Bar Association after she had testified adversely to him in a domestic proceeding. Petitioner's statements or threats may have been "provocative and challenging." They may have been "crude and offensive." Watts, 889 S.Ct., at 1402. However, absent a "clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest," Terminiello, supra, 69 S.Ct. at 896, the constitution does not allow such speech to be made a crime. City of Houston v. Hill, 482 U.S. 451, 96 L.Ed.2d 398, 107 S.Ct. 2502, 2510 (1987).

This court has been unwavering in its adherence to this

principle. In Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), the court reversed the conviction of a Ku Klux Klan leader for threatening "revengeance" if the "suppression" of the white race continued. The court relied on "the principle that the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Id., at 447, 89 S.Ct. at 1829. The court returned to this principle in reversing a civil damage award against civil rights advocates who participated in economic boycott activity against white merchants in the segregated south. N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 73 L.Ed.2d 1215, 102 S.Ct. 3409 (1982). The court held that fiery, emotionally charged speech targeted at threatening white merchants was entitled to First Amendment protection so long as the speech did not expressly provoke immediate violence. (". . . mere advocacy of this use of force or violence does not remove speech from the protection of the First Amendment." 102 S.Ct., at 3433).

In the instant case, the respondent State of Washington argues that Mr. Antoni's threats of legal action and formal complaints against the court appointed guardian ad litem can constitutionally be criminalized because the state has a legitimate interest in preserving the integrity of the civil justice system by protecting witnesses who testify in official proceedings. The state certainly has a legitimate interest in protecting the integrity of the judicial system. However, Mr. Antoni's conduct in this case posed no threat to the judicial process. His "threats" (legal action, bar complaint) were made after the guardian ad litem had testified and fulfilled her function in the domestic proceeding. His conduct could not have improperly influenced the trial of the domestic action because the trial had already been concluded.

More importantly, Antoni's conduct which the state criminalized involved nothing more than (1) threatening

access to the civil justice system, and (2) threatening a complaint to the State Bar Association. There are orderly processes available to respond to both "threats." The civil justice system is well equipped to determine the legitimacy of any legal action Antoni might have chosen to pursue against the guardian ad litem. Indeed, if Antoni were found to have abused the civil justice system he may well have been held civilly liable. The Washington State Bar Association has an orderly process to respond to bar complaints by citizens against Washington state lawyers. However, to criminalize Antoni's "threats" to access the civil justice system, or to report an attorney to the State Bar Association tramples on his First Amendment rights.

The State of Washington convicted Mr. Antoni of Witness Intimidation because he threatened to file suit against a court appointed guardian ad litem, and to file a bar complaint against that person after she testified adversely to him in a civil proceeding. This conviction is completely contrary to this court's First Amendment jurisprudence, as articulated in Terminiello, supra, Watts, supra, Bradenburg, supra, and Claiborne Hardware Co., supra. Petitioner respectfully requests this court to grant certiorari, accept review, and reverse the decision of the Washington court.

II.

RCW 9A.72.110(2) IS UNCONSTITUTIONALLY OVERBROAD IN VIOLATION OF THE FIRST AMENDMENT. THE WASHINGTON COURT'S DECISION UPHOLDING THE CONSTITUTIONALITY OF THIS STATUTE CONFLICTS WITH THIS COURT'S OVERBREADTH JURISPRUDENCE, AND WITH WURTZ v. RISLEY, 719 F.2D 1438 (9th CIR. 1983).

In general, the First Amendment prevents the government from proscribing speech or expressive conduct. R.A.V. v. City of St. Paul, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). Overbreadth analysis is intended to ensure

that legislative enactments do not prohibit constitutionally protected speech. Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). A criminal statute that proscribes constitutionally protected free speech activities may be overbroad, and thus violate the First Amendment to the United States Constitution. City of Houston v. Hill, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987).

In a facial challenge to the overbreadth of a law, the court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. City of Houston v. Hill, supra. Criminal statutes must be scrutinized with particular care; "those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." Id., 2508.

RCW 9A.72.110 provides in relevant part:

...

(2) A person also is guilty of intimidating a witness if the person directs a threat to a former witness because of the witness' role in an official proceeding.

(3) As used in this section:

(a) "Threat" means:

(i) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or

(ii) Threat as defined in RCW 9A.04.110(25).

RCW 9A.04.110(25) provides:

"Threat" means to communicate, directly or indirectly the intent:

(a) To cause bodily injury in the future to the person threatened or to any other person;

(b) To cause physical damage to the property of a person other than the

actor; or

(c) To subject the person threatened or any other person to physical confinement or restraint; or

(d) To accuse any person of a crime or cause criminal charges to be instituted against any person; or

(e) To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt or ridicule; or

(f) To reveal any information sought to be concealed by the person threatened; or

(g) To testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(h) To take wrongful action as an official against anyone or anything, or wrongfully withhold official action, or cause such action or withholding; or

(i) To bring about or continue a strike, boycott, or other similar collective action to obtain property which is not demanded or received for the benefit of the group which the actor purports to represent; or

(j) To do any other act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition, or personal relationships.

In the instant case, the Court of Appeals properly held that Mr. Antoni's "threats" to initiate legal action against the guardian ad litem were not "true threats" of bodily harm, but rather were threats of a financial or business nature, and were therefore entitled to First Amendment protection. State v.

Antoni, Slip. Op., at 10-11, citing State v. Stephenson, 89 Wn. App. 794, 801, 950 P.2d 38, review denied, 136 Wn.2d 1018 (1998). The government may regulate protected speech by view-point neutral, reasonable time, place and manner restrictions. Hill v. Colorado, _____ U.S. _____ 120 S.Ct. 2480, _____ L.Ed.2d _____ (2000). The Court of Appeals also properly characterized the speech at issue in the instant case as "private speech." State v. Antoni, supra, at 11. Private speech may be regulated if the distinctions drawn are reasonable in light of the purpose of the statute and if they are view-point neutral. Cornelius v. N.A.A.C.P. Legal Defense & Education Fund, 473 U.S. 788, 806, 87 L.Ed.2d 567, 105 S.Ct. 3439 (1985).

The Court of Appeals then erred in applying these overbreadth principles to RCW 9A.76.110(2). In ruling that the statute is sufficiently narrowly tailored to withstand the overbreadth attack, the Antoni court observed at p. 12:

> In this case, the threat must be made with the intent to produce a particular result, i.e., influence testimony, induce the witness to elude the legal process, or induce the witness to avoid the hearing.

With this observation, the Antoni court construed the wrong statute. The "tailoring" language referenced -- "influence testimony, induce the witness to elude legal process, or induce the witness to avoid the hearing" - is found in RCW 9A.76.110(1)[3]. However, this is not the statute at issue

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[3] RCW 9A.72.110(1) provides in relevant part:

> A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to:
>
> (a) Influence the testimony of that person;

in this case. Mr. Antoni was convicted on Count III of intimidating a former witness in violation of RCW 9A.76.110(2). The Court of Appeals erred in this case by construing the wrong statute.

RCW 9A.76.110(2) prohibits "threats" against former witnesses because of their prior testimony in proceedings which have previously taken place. It is precisely because the statute is not "tailored" or intended to produce a particular result, i.e., preventing influence of testimony to be given, that it does not serve any compelling governmental interest and in fact proscribes constitutionally protected speech. The statute simply prohibits citizens from expressing vigorous and vehement disagreement with a witness who testifies in an official proceeding. This is tantamount to prohibiting vigorous debate over the content of a witness' testimony.

The facts in the instant case clearly illustrate the serious constitutional problem presented by the broad, virtually unlimited scope of RCW 9A.72.110(2). The Court of Appeals described Antoni's speech for which he was convicted on Count III under RCW 9A.72.110(2):

> After the trial, Mr. Antoni again wrote Ms. Cloaninger a letter on September 15, 1997. In that letter, Mr. Antoni states in part:
>
> > Finally, your report along with your testimony show that you will stoop to any lie to get YOUR results. You are FIRED as an incompetent GAL for my

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> (b) Induce that person to elude legal process summoning him or her to testify;
>
> (c) Induce that person to absent himself or herself from such proceedings;
>
> . . .

> daughter, Meghan Antoni, IMMEDIATELY. . . .
> Legal action will commence upon you in the near future. Contrary to GAL immunity laws, you have overstepped your authority. I will exhaust ALL my financial resources to bring the full force of [the] law against you and your unlawful legal practice and that of a so called Guardian Ad Litem.

On December 22, 1997, Mr. Antoni informed Ms. Cloaninger's secretary that he was filing a bar complaint and a complaint against her with the Attorney General's office. . . .

. . . Mr. Antoni filed a "Lis Pendis [sic] and Declaration of Dan R. Antoni, "stating "[a] lis pendis [sic] action will be filed against Leslie A.M. Cloaninger and John Doe Cloaninger in the near future." That document stated in part:

> It is absolutely clear by the GAL, Leslie A.M. Cloaninger, that Ms. Cloaninger was biased against the Respondent and would do anything in her power to deceive and mislead the Court. She lied under oath. She mis-represented [sic] facts. She conducted a one sided [sic] investigation. . . She violated her duties as an officer of the court. I ask a number of questions. <u>These are NOT Statements</u>. Why did she do all of the above? Did she have a sexual relationship with my ex-

> wife??? Was she bribed??? One may only guess after she ignored all the expert evidence?

State v. Antoni, supra, slip. op., at 3-4.

Mr. Antoni's post proceeding threats of litigation and vituperative comments directed to the guardian ad litem may have been in deplorable taste. They certainly were highly offensive and terribly unsettling to their target. However, independent of their offensive or deplorable character, Mr. Antoni's "threats" constitute pure speech. See Wurtz v. Risley, 719 F.2d 1438 (9th Cir. 1983). The Washington Court of Appeals held that this speech could properly be criminalized because it was made to produce a particular result, i.e., influence testimony, induce the witness to elude the legal process, or induce the witness to avoid the hearing. There certainly is no question that the state has some interest in prohibiting threats made for these purposes. However, because Antoni's "threats" were made after the completion of the official proceeding at issue, this interest of the state was not jeopardized. Indeed, that is precisely why Antoni was charged in Count III under RCW 9A.72.110(2) which prohibits intimidation of a "former witness."

The State of Washington criminalized Mr. Antoni's speech. Because the speech at issue occurred after the victim/witness had already testified in the official proceeding, the state had no legitimate interest which justified punishing Mr. Antoni for his speech. Independent of the expansive definition of the term "threat" in the statute, RCW 9A.72.110(2) is unconstitutionally overbroad because the state has no legitimate interest which justifies the statutory regulation of pure speech.

When the expansive statutory definition of the term "threat" is considered, the First Amendment overbreadth problem is even more glaring. First, there is no doubt that the statute targets pure speech. RCW 9A.72.110(3) defines threat:

> (3) As used in this section:
>
> (a) "Threat" means:

(i) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or

(ii) Threat as defined in RCW 9A.04.110(25).

RCW 9A.04.110(25) provides that "threat" means to "communicate, directly or indirectly the intent" . . . to do a laundry list of offensive things to another person. Thus the witness intimidation statute regulates communication, i.e., speech. There is no limitation in the statute requiring that the state demonstrate the speaker had the apparent ability to implement or carry out the threat. There is no statutory requirement that the object of the threat have a reasonable fear that the substance of the threat might actually be carried out. The statute therefore regulates only speech, and the regulation has virtually no limitation. Moreover, the state has no legitimate interest in regulating the speech because the judicial or official proceeding, the integrity of which is intended to be protected, has already been completed under the express terms of RCW 9A.72.110(2).

In Wurtz v. Risley, supra, the Ninth Circuit considered an overbreadth challenge to a Montana "intimidation" statute which proscribed "threats to perform without lawful authority . . . [the commission] of any criminal offense." The court held the statute was unconstitutionally overbroad, and explained:

> The operative act forbidden by section 203(1)(c) is communication, and the crime is complete as soon as the threat to commit a criminal act is communicated with the requisite intent. There is no link to action required; the threat need not succeed in inducing the victim to act or refrain from acting, as it was required to do under the Oregon statute. Nor must the threatened criminal act be carried out. The communication condemned by the statute is thus "in no way brigaded with action." *See Speiser v. Randall*, 357 U.S. 513, 536, 78 S.Ct. 1332, 1346, 2 L.Ed.2d 1460 (1958) (Douglas, J., concurring). The

> thrust of the statute is thus toward pure speech and away from the regulation of conduct.
> It is true that threats have traditionally been punishable without violation of the first amendment, but implicit in the nature of such punishable threats is a reasonable tendency to produce in the victim a fear that the threat will be carried out. *See Landry v. Daley*, 280 F. Supp. 938, 962 (N.D. Ill. 1968) (three-judge court), *rev'd on other grounds sub. nom. Boyle v. Landry*, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971). Section 203(1)(c) is not so limited. It is possible by judicial construction to read an element of instilling fear into the term "threat," *id.*, but the Supreme Court of Montana has imposed no such narrowing construction upon section 203(1)(c). "[A] statute . . . which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." *Watts v. United States*, 394 U.S. 705, 707, 89 S.Ct. 1399, 1401, 22 L.Ed.2d 664 (1969) (per curiam).

719 F.2d, at 1441.

Similarly, RCW 9A.72.110(2) forbids communication or speech, and the crime is committed as soon as the threat to do any of a number of things is conveyed. The communication is "in no way brigaded with action." There is no requirement in the statute that the evidence show a reasonable tendency to produce in the victim a fear that the threat will be carried out.

In City of Houston v. Hill, supra, the court struck down a Houston ordinance which made it a crime to interrupt a police officer in the execution of his duty. The court certainly recognized that government has a legitimate interest in allowing law enforcement officers to perform their necessary functions. However, the state's interest in promoting effective

law enforcement could not trump the citizen's free speech rights, absent a showing that the speech at issue inflicted real injury or tended "to incite an immediate breach of the peace." Hill, supra, 107 S.Ct., at 2509-2510. The court explained:

> The Houston ordinance is much more sweeping than the municipal ordinance struck down in Lewis. It is not limited to fighting words nor even to obscene or opprobrious language, but prohibits speech that "in any manner. . . 'interrupts' an officer." The constitution does not allow such speech to be made a crime.

Id., at 2510

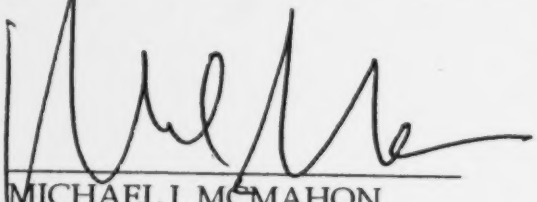
In the instant case, RCW 9A.72.110(2) regulation of speech is not limited to fighting words or words which tend to incite an immediate breach of the peace. Indeed, the statute proscribes speech which does no harm other than to offend its target. This is true because there is no requirement that the threats criminalized by the statute reasonably appear to have the potential to be implemented or carried out.

RCW 9A.72.110(2) criminalizes offensive speech targeted at a witness after the witness has testified in an official proceeding. There is no limitation in the statute indicating that the speech is criminal only if it somehow influences the witnesses' testimony, or the outcome of the official proceeding at issue. The statute criminalizes words regardless of their impact. This is repugnant to the First Amendment. RCW 9A.72.110(2) is unconstitutionally overbroad and should be struck down.

CONCLUSION

Petitioner respectfully requests the court to grant a writ of certiorari, accept review of the decision of the Court of Appeals, and reverse his conviction of witness intimidation under RCW 9A.72.110(2) as violative of his First Amendment rights.

RESPECTFULLY SUBMITTED this 13 day of June, 2001.



MICHAEL J. MCMAHON
(Counsel of Record)
WSBA No. 06895
PAUL J. BURNS
WSBA No. 13320
Attorneys for Petitioner

APPENDIX

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THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	NO. 70349-3
Respondent,	)	
	)	**ORDER**
v.	)	
	)	(Filed 02/06/01)
DANIEL REINHOLD ANTONI,	)	
	)	
Petitioner	)	

Department II of the Court considered this matter at its February 6, 2001, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 6th Day of February, 2001.

/s/ Gerry L. Alexander
CHIEF JUSTICE

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	**MANDATE**
Respondent,	)	
	)	No. 19158-3-III
v.	)	
	)	Whitman County No.
DANIEL REINHOLD	)	98-1-00052-4
ANTONI,	)	
	)	(Filed 02/14/01)
Appellant.	)	

The State of Washington to: The Superior Court of the State of Washington, in and for **Whitman** County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division III, filed on **September 14, 2000** became the decision terminating review of this court in the above-entitled case on **February 6, 2001**. The cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

cc: Daniel Reinhold Antoni
Paul J. Burns
J. Tobin Krauel
Ann C. Shannon
Hon. Richard J. Schroeder
Indeterminate Sentence Review Board
Department of Corrections

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Spokane, this 13th day of February, 2001.

/s/ Patricia Crandall
Clerk of the Court of Appeals,
State of Washington
Division III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	NO. 19158-3-III
Respondent,	)	
	)	Division Three
v.	)	Panel Six
	)	
DANIEL REINHOLD ANTONI,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED SEP 14 2000

KURTZ, C.J. - If a criminal defendant is charged with alternative means of committing a crime, the jury must be instructed that it must be unanimous as to the means used if there is insufficient evidence to support a conviction on any one of the alternative means charged. State v. Ortega-Martinez, 124 Wn.2d, 702, 707-08, 881 P.2d 231 (1994). Daniel R. Antoni was convicted of two counts of intimidating a witness. He appeals, contending that the court's failure to provide a unanimity instruction was fatal because insufficient evidence existed regarding all three means of intimidating a witness. Because there was insufficient evidence to support the conviction on one of the alternative means of committing the crime, we conclude the court erred in failing to give a unanimity instruction. Mr. Antoni was also convicted of intimidating a former witness. He challenges the statute as unconstitutionally overbroad. We conclude that the statute, RCW 9A.72.110, is not overbroad as it applies to threats made to witnesses because the statute is sufficiently narrowly tailored to meet a compelling government purpose.

FACTS

Daniel R. Antoni was involved in a custody dispute regarding visitation with his daughter. Leslie A.M. Cloaninger was appointed guardian ad litem for the little girl. Mr. Antoni was convicted of one count of intimidating Ms. Cloaninger as a prospective witness and one count of intimidating her as a former witness.

In the course of her investigation, Ms. Cloaninger became concerned about Mr. Antoni's erratic behavior, and she requested that he undergo a mental evaluation. Sometime after his evaluation, Mr. Antoni filed a motion to remove Ms. Cloaninger as guardian ad litem. Mr. Antoni then served Ms. Cloaninger with a summons and complaint, naming her and Colleen Harrington, Mr. Antoni's ex-wife's attorney, as defendants. The complaint alleged abuse of process and requested $100,000 in damages.

Mr. Antoni followed the summons and complaint with a letter to Ms. Cloaninger, dated April 3, 1997. The letter stated in part:

> Broadly speaking, it is not me who will decide to file the suit, at least not autonomously. The primary determination in this regard will be the Defendants themselves and each Defendant's individual attitude regarding the claim.
>
> Put more simply, if there is a serious and reasonable effort to settle the claim, then there is obviously no urgency in filing the suit. On the other hand, if the opposite occurs, filing of the suit and the litigation associated with the filing is a certainty.

Ms. Cloaninger filed her report with the court on June 1, 1997.

She also testified at the trial in August 1997. Her testimony was not helpful to Mr. Antoni.

After the trial, Mr. Antoni again wrote Ms. Cloaninger a letter on September 15, 1997. In that letter, Mr. Antoni states in part:

> Finally, your report along with your testimony show that you will stoop to any lie to get YOUR results. You are FIRED as an incompetent GAL for my daughter, Meghan Antoni, IMMEDIATELY....
>
> Legal action will commence upon you in the near future. Contrary to GAL immunity laws, yo have overstepped your authority. I will exhaust ALL my financial resources to bring the full force of [the] law against you and your unlawful legal practice and that of a so called Guardian Ad Litem.

On December 22, 1997, Mr. Antoni informed Ms. Cloaninger's secretary that he was filing a bar complaint and a complaint against her with the Attorney General's office.

Six months later, as Ms. Cloaninger was walking to her office from the courthouse, Mr. Antoni blocked her progress with his truck and yelled, "Leslie, will you dike my ex-wife for me?" The following day, Mr. Antoni filed a "Lis Pendis [sic] and Declaration of Dan R. Antoni," stating "[a] lis pendis [sic] action will be filed against Leslie A.M. Cloaninger and John Doe Cloaninger in the near future." That document stated in part:

> It is absolutely clear by the GAL, Leslie A.M. Cloaninger, that Ms. Cloaninger was biased against the Respondent and would do anything

> in her power to deceive and mislead the Court. She lied under oath. She mis-represented [sic] facts. She conducted a one sided [sic] investigation. . . . She violated her duties as an officer of the court. I ask a number of questions. *These are NOT Statements*. Why did she do all of the above? Did she have a sexual relationship with my ex-wife??? Was she bribed??? One may only guess after she ignored all the expert evidence?

Mr. Antoni was charged by amended information with four counts of intimidating a witness in violation of RCW 9A.72.110. At trial, Mr. Antoni testified that he knew the guardian ad litem's report was very important in determining custody disputes. He also said he had no evidence that Ms. Cloaninger was bribed or was having a sexual relationship with his ex-wife. The jury convicted Mr. Antoni of Count II, intimidating the guardian ad litem as a prospective witness, and Count III, intimidating the guardian ad litem as a former witness.

Following the trial, Mr. Antoni moved for a new trial, claiming a jury instruction error on Count II and alleging the statute as applied in Count III is unconstitutionally overbroad. The motion was denied. Mr. Antoni appeals.

ANALYSIS

Did the trial court err by failing to instruct the jury it must be unanimous regarding which of the alternative means Mr. Antoni employed in intimidating the witness?

Under RCW 9A.72.110(1), a person can intimidate a witness using one of three alternative means. If insufficient evidence exists on any one of the alternative means, the jury

must be instructed its decision must be unanimous as to which of the means was used. Mr. Antoni contends that in this case insufficient evidence exists regarding all three alternative means of intimidating a witness and, therefore, the court erred by failing to instruct the jury that its decision must be unanimous on the means used to intimidate a witness.

Criminal defendants in Washington have a right to a jury verdict. CONST. art. I, § 21. This right includes the right to an expressly unanimous verdict. State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). In certain situations, the right to a unanimous jury trial also includes the right to express jury unanimity on the means the defendant used in committing the crime. Id.; State v. Green, 94 Wn.2d 216, 232-33, 616 P.2d 628 (1980); see State v. Whitney, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987).

"The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury." Ortega-Martinez, 124 Wn.2d at 707. If the evidence is sufficient on each of the means of committing the crime, a unanimity instruction is not necessary and it is inferred that the jury based its decision on a unanimous finding as to the means. Id. at 707-08; Whitney, 108 Wn.2d at 511. On the other hand, where the evidence is insufficient to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed. Ortega-Martinez, 124 Wn.2d at 708; Green, 94 Wn.2d 216.

In this case, the court must determine whether sufficient evidence supported each of the three alternative means of intimidating a witness. Evidence is sufficient if "'after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt.'" Ortega-Martinez, 124 Wn.2d at 708 (quoting State v. Repel, 114

Wn.2d 77, 82, 785 P.2d 1134 (1990)).

To affirm Mr. Antoni's conviction on Count II in the absence of a unanimity instruction, the record must contain sufficient evidence that Mr. Antoni, by use of threat, attempted to (a) influence the testimony of Ms. Cloaninger; (b) induce Ms. Cloaninger to elude legal process summoning her to testify; and (c) induce Ms. Cloaninger to absent herself from the proceedings. See RCW 9A.72.110(1)(a)-(c).

"'A jury may infer intent where a defendant's conduct plainly indicates the requisite intent as a matter of logical probability.'" State v. Savaria, 82 Wn. App. 832, 841, 919 P.2d 1263 (1996) (quoting State v. Lopez, 79 Wn. App. 755, 768 ,904 P.2d 1179 (1995)). In Savaria, Steven Savaria was charged with intimidating a witness with two means: attempting to influence the witness's testimony and attempting to induce the witness to absent herself from the proceedings. In that case, the witness told Mr. Savaria over the phone that she was going to testify against h im the next day. Mr. Savaria became very angry and said he would get revenge. He threatened to kill her with a gun. At the courthouse, when Mr. Savaria saw the witness, he glared at her and exhibited his middle finger. Savaria, 82 Wn. App. at 835. The court found that while Mr. Savaria's actions evidenced his unhappiness that the witness was at the courthouse willing to testify, the acts "did not provide a basis for the jury to conclude that Savaria was thereby attempting to influence the content of [the witness's] testimony." Id. at 841.

In this case, prior to Ms. Cloaninger's report and testimony, Mr. Antoni served her with a lawsuit, followed by a letter indicating that her "attitude" toward the case would determine whether the suit was filed. Mr. Antoni's letter also states that if a serious and reasonable effort is made to settle the claim, then the suit will not be filed. First, the lawsuit and letter can logically be construed as Mr. Antoni's attempt to influence Ms. Cloaninger's testimony. He did not file the

lawsuit, rather he only threatened to file it. He explicitly stated in the letter that initiation of the suit would depend on Ms. Cloaninger's attitude toward the case and, therefore, toward him. As such, Mr. Antoni was attempting to induce Ms. Cloaninger to change her testimony to be helpful to him by threatening a lawsuit if she did not.

Next, Mr. Antoni's acts may be construed as a threat, attempting to induce Ms. Cloaninger to absent herself from the proceedings. Mr. Antoni's letter threatening the suit implies that if Ms. Cloaninger's attitude regarding the suit pleased him, the suit might not be filed. It is reasonable to conclude that Ms. Cloaninger's choices under Mr. Antoni's letter were to either change her report and create a report that was favorable to him, or to refuse to give her report to the court. Because refusal to give her report to the court was a logical response to Mr. Antoni's demands, the evidence was sufficient that Mr. Antoni attempted to induce Ms. Cloaninger to absent herself from the proceedings by refusing to provided her report.

However, there was no evidence at trial that Mr. Antoni threatened the guardian ad litem in an attempt to induce her to elude or avoid legal process summoning her to testify. In fact, there was no evidence substantiating the existence of any legal process summoning Ms. Cloaninger to testify. Because there was insufficient evidence to support the conviction on this alternative means of committing the crime charged in Count II, the court erred in failing to give a unanimity instruction on that count.

Mr. Antoni's conviction on Count II is reversed.

Is RCW 9A.72.110(2) unconstitutionally overbroad?

Mr. Antoni contends the definition of the term "threat" used in RCW 9A.04.110(25), a definition that is incorporated in the witness intimidation statute, encompasses constitutionally

protected speech and, therefore, the statute is invalid. He argues the intimidation statute serves to silence public or private objection for a former witness because of that witness's role in any official proceeding. As analyzed by Mr. Anton, the statute not only prohibits threats or speech that is intended to influence the testimony of a witness, it silences any public or private disagreement with a former witness regarding the witness's testimony. For example, Mr. Antoni maintains that the statute could be interpreted as prohibiting a litigant from accusing a witness of perjury. According to Mr. Antoni, this makes RCW 9A.72.110(2) unconstitutionally overbroad, both under the state and the federal constitutions.

In general, the First Amendment prevents the government from proscribing speech or expressive conduct. R.A.V. v. City of St. Paul, 505 U.S. 377, 381, 112 S. Ct. 2538, 120 L.Ed.2d 305 (1992). Overbreadth analysis measures how statutes that prohibit conduct fit within the universe of constitutionally protected conduct. City of Tacoma v. Luvene, 118 Wn.2d 826, 839, 827 P.2d 1374 (1992). "A law is overbroad if it sweeps within its prohibitions free speech activities protected under the First Amendment." State v. Halstein, 122 Wn.2d 109, 122, 857 P.2d 270 (1993).

"The first task in overbreadth analysis is to determine if a statute reaches constitutionally protected speech or expressive conduct." Id. at 122-23. If the answer is "yes," then the court examines whether the statute prohibits plainly legitimate sweep. Id. At 123. "If possible, a statute must be interpreted in a manner that upholds its constitutionality." Id. Application of the overbreadth doctrine should be employed by a court sparingly and only as a last resort. O'Day v. King County, 109 Wn.2d 796, 804, 749 P.2d 142 (1988).

Certain types of speech, such as fighting words and "true threats" receive no protection under the First Amendment. State v. Knowles, 91 Wn. App. 367, 373, 957 P.2d 797, review denied, 136 Wn.2d 1029 (1998). A "true threat" is

made under circumstances that a reasonable person would interpret to convey a serious expression of intent to inflict bodily harm. Id. (Citing United States v. Khorrami, 895 F.2d 1186, 1192 (7th Cir. 1990)). Threatening an individual with financial or personal harm that is not physical does not constitute a "true threat." Knowles, 91 Wn. App. 374. In this case, Mr. Antoni's threats were not "true threats" of bodily harm, but rather were threats of a financial or business nature. As such, Mr. Antoni's speech was entitled to some First Amendment protection. Id.; see State v. Stephenson, 89 Wn. App. 794, 801, 950 P.2d 38, review denied, 136 Wn.2d 1018 (1998).

The government may regulate protected speech by view-point neutral, reasonable time, place and manner restrictions. Knowles, 91 Wn. App. at 374-75 (citing City of Seattle v. Ivan, 71 Wn. App. 145, 152, 856 P.2d 1116 (1993)). The extent of permissible regulation depends on whether the speech is conducted in a private or public forum. City of Seattle v. Huff, 111 Wn.2d 923, 926-27, 767 P.2d 572 (1989). Speech receives greater protection in the public forum. Knowles, 91 Wn. App. at 375. In this case, as in Knowles and Stephenson, the statute at issue addresses threats generally disseminated through private communications. Thus, the constitutional standard for private speech is applied to RCW 9A.04.110(25)(e) and (j).

Private speech may be regulated if the distinctions drawn are reasonable in light of the purpose of the statute and if they are view-point neutral. Knowles, 91 Wn. App. at 375-76 (citing City of Seattle v. Eze, 111 Wn.2d 22, 32, 759 P.2d 366, 78 A.L.R. 4th 1115 (1988)). Mr. Antoni acknowledges that the obvious purpose of the witness intimidation statute is to protect witnesses in judicial and other official proceedings from threats of intimidation. He also acknowledges that the State has a compelling interest in protecting the integrity of the civil and criminal justice system. But, he argues, RCW

9A.72.110(2) silences all objections to a former witness's testimony. Mr. Antoni relies upon Ivan as support for his argument.

At issue in this case is the definition of "threat" found in RCW 9A.04.110(25)(e) and (j). The Stephenson court found that RCW 9A.04.110(25)(j) burdened a substantial amount of protected speech. Knowles, 91 Wn. App. at 374. Similarly, subsection (e), which is a threat to expose a fact that would subject the person to hatred, contempt, or ridicule, potentially burdens a substantial amount of protected speech because, like the ordinance at issue in Ivan, it prohibits "a wide range of communications beyond mere fighting words and other nonprotected speech." Ivan, 71 Wn. App. at 151.

However, the ordinance in Ivan that was struck as overbroad is distinguishable from the present statute. In Ivan, the ordinance criminalized a threat to any person if it induced a person to engage in conduct that the person had a legal right to abstain from, or to abstain from conduct the person had a legal right to engage in. Id. at 148. The Seattle ordinance criminalized any threatening communications that happened to induce certain responses, and the threat did not need to be made with the intent to compel or induce the threatened person to act or abstain from acts. In this case, the threat must be made with the intent to produce a particular result, i.e., influence testimony, induce the witness to elude the legal process, or induce the witness to avoid the hearing.

Additionally, the Ivan ordinance was broad in that it applied to any person. The statute at issue is more narrowly drawn, because it only applies to witnesses in official proceedings. See also Knowles, 91 Wn. App. 367 (intimidating a judge statute narrowly tailored because it applies only to judges and criminalizes only threats made because of or to influence official acts); Stephenson, 89 Wn. App. 794 (intimidating a public servant statute narrowly tailored because the criminalized threat must be made as a result of a

prior official act).

Mr. Antoni complains that the definition of "threat" is so broad that a person could not raise a legitimate complaint arising from a former witness's testimony. However, even if protected acts or communications fall within the statute, a statute will not be found overbroad where it is merely possible to conceive of circumstances in which application of the statute would be unreasonable. Knowles, 91 Wn. App. at 379-80. "Unless there is a realistic danger that the statute will significantly compromise recognized First Amendment protections of parties not before the court, we will not declare it facially invalid on overbreadth grounds." Id. At 380 (citing Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 801, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984)).

In Knowles, the court found that RCW 9A.04.110(25)(j) was not overbroad as it applied to threats made to influence official acts of judges because the statute was sufficiently narrowly tailored to meet a compelling government purpose. Knowles, 91 Wn. App. at 380. That same subsection should not be found to be overbroad as it relates to the witness intimidation statute because the statute is similarly narrowly tailored to meet a compelling government purpose.

Additionally, RCW 9A.04.110(25)(e), which defines threat as the intent to expose a secret or publicize a fact, true or false, that would subject the person to hatred, contempt, or ridicule, should not be found overbroad for the same reason. The statute is narrowly tailored to meet a compelling government interest, and subsection (e) defines a specific type of threat that is aimed at a person because of their participation as a witness in an official proceeding. As applied here, the statute covers a narrow class of persons, former witnesses, and thus is sufficiently narrowly tailored and is not unconstitutionally overbroad.

Finally, Mr. Antoni's challenge under Washington's constitution fails because our Washington State Supreme

Court has adopted the federal standard for speech in a nonpublic forum. Huff, 111 Wn.2d at 926.

Mr. Antoni's conviction on Count III is affirmed.

Reversed in part; affirmed in part.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

/s/ Kurtz, C.J.
KURTZ, C.J.

WE CONCUR:

/s/ Schultheis, J.
Schultheis, J.

/s/ Sweeney, J.
Sweeney, J.

SUPERIOR COURT, STATE OF WASHINGTON
COUNTY OF WHITMAN

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 98-1-00052-4
	)	
v.	)	ORDER DENYING
	)	DEFENDANT'S
DANIEL REINHOLD	)	MOTION FOR NEW
ANTONI,	)	TRIAL
	)	
Defendant.	)	(Filed 05/05/99)

THIS MATTER came on before the court on Defendant's Motion for New Trial. The court reviewed the records and files herein, and the following:

1. Defendant's Motion for New Trial;

2. Defendant's Memorandum of Authorities in Support of Motion for New Trial;

3. Plaintiff's (State's) Memorandum of Authorities in Opposition to Defendant's Motion for New Trial;

4. Defendant's Reply Memorandum in Support of Motion for New Trial.

Having reviewed the records and files herein, the court finds as follows:

1. With respect to Count II of the information, there was sufficient evidence in the record to support defendant's conviction on each of the alternative means charged. Therefore, no unanimity instruction was required;

2. With respect to Count III of the information, under the analysis of State v. Garvin, 28 Wn. App. 82, 621 P.2d 215 (1980), no unanimity instruction was required;

3. RCW 9A.72.110(1) and RCW 9A.04.110(25) are not unconstitutionally overbroad, and do not violate the First

Amendment protection of freedom of speech;

4. RCW 9A.72.110(2) and RCW 9A.04.110(25) are not unconstitutionally overbroad and do not violate the First Amendment protection of freedom of speech.

Therefore, it is hereby ORDERED, ADJUDGED AND DECREED that Defendant's Motion for New Trial is DENIED. /s/ oral decision rendered on 04/16/99.

DONE IN OPEN COURT this 3rd day of May, 1999.

/s/ RICHARD J. SCHROEDER
HONORABLE RICHARD SCHROEDER

Presented by:

PAUL J. BURNS, P.S.

By: /s/PAUL J. BURNS
PAUL J. BURNS
WSBA No. 13320
Attorney for Defendant

Copy received, Approved as to Form,
Notice of Presentment Waived:

/s/ J. TOBIN KRAUEL
J. TOBIN KRAUEL
Senior Deputy Prosecuting Attorney
WSBA No. 24100
Attorney for Plaintiff

SUPERIOR COURT OF WASHINGTON
COUNTY OF WHITMAN

STATE OF WASHINGTON, Plaintiff, v. DANIEL REINHOLD ANTONI, Defendant. SID: WA19188658 DOB: 12-31-53	NO. 98-1-00052-1 JUDGMENT AND SENTENCE (JS) [X] First Time Offender Sentencing Option (Filed 04/20/99)

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and deputy prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the Court FINDS:

2.1 CURRENT OFFENSE(s): The defendant was found guilty on 01/28/99

by [] plea [X] jury-verdict [] bench trial of:

COUNT	CRIME	RCW	DATE OF CRIME
II	Intimidating a Witness, a nonviolent, Class B felony	9A.72.110	03/20/97 to 08/30/97
III	Intimidating a Witness, a nonviolent, Class B felony	9A.72.110	09/15/97 to 06/03/98

as charged in the Amended Information.

2.2 CRIMINAL HISTORY: Prior convictions constituting a criminal history for purposes of calculating the offender score are (RCW 9.94A.360): Not applicable. Defendant is a first time offender.

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements
I	0	IV	0-90 days
II	0	IV	0-90 days

Plus Enhancement for Firearm (F) other deadly weapon finding (D), or VUCSA (V) in a protected zone	STANDARD RANGE TOTAL (including enhancements)	MAXIMUM TERM
n/a	0-90 days	10 yrs/$20,000
n/a	0-90 days	10 yrs/$20,000

[ ] Additional current offense sentencing data is attached in Appendix 2.3.

2.4 [ ] Exceptional Sentence Substantial and compelling reasons exist which justify an exceptional sentence

[ ] above [ ] within [ ] below the standard range for Count(s) _____. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.142

2.6 Not applicable.

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 [X] The jury was unable to reach a verdict in Count I (hung jury)

[X] The defendant is found NOT GUILTY of Count IV.

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court:

JASS CODE		
RTN/RJN	$_____	Restitution to: To Be Determined
PCV	$ 500.00	Victim assessment - RCW 7.68.035
CRC	$ 113.00	Court costs - RCW 9.94A.030, 9.94A.120, 10.01.160, 10.146.190

including:

Criminal filing fee	$ 110.00	FRC
Witness costs	$	WFR
Sheriff service fees	$ 0.00	SFW
Jury demand fee	$	JFR
Prosecutor serv.	$ 3,00	PPS

PUB	$ n/a	Fees for court-appointed

		attorney - RCW 9.94A.030
WFR	$	Court appointed defense expert and other defense costs - RCW 9.94A.030
PCM	$	Fine RCW 9A.20.021; [] VUCSA additional fine deferred due to indigency - RCW 69.50.430
CDF/LDI/ FCD/NTF/ SAD/SDI	$	Drug enforcement fund of - RCW 9.94A.030
CLF	$	Crime lab fee [ ] deferred due to indigency - RCW 43.43.690
EXT	$	Extradition Costs - RCW 9.94A.120
	$	Emergency response costs (Vehicular Homicide only, $1,000 maximum), RCW 38.52.430
	$	Other costs for:
	$ 613.00	TOTAL - RCW 9.94A.145

All payments shall be made in accordance with the policies of the clerk and on a schedule established by the Department of Corrections, commencing immediately, unless the court specifically sets forth the rate here: Not less than $100.00 per month commencing at the discretion of the Department of Corrections. RCW 9.94A.145.

[ ] In addition to the other costs imposed herein the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate. RCW 9.94A.145.

[X] The defendant shall pay the costs of service to collect unpaid legal financial obligations. RCW 36.18.190

THE FINANCIAL OBLIGATIONS IMPOSED IN THIS JUDGMENT SHALL BEAR INTEREST FROM THE DATE OF THE JUDGMENT UNTIL PAYMENT IN FULL, AT THE RATE APPLICABLE TO CIVIL JUDGMENTS. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligation. RCW 10.73

4.2 [ ] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340 (Not applicable)

[ ] DNA TESTING. The defendant shall have a blood sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or Department of Corrections, shall be responsible for obtaining the same prior to the defendant's release from confinement. RCW 43.43.754 (Not applicable)

4.3 The defendant shall not have contact with Leslie Cloaninger _____ including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (not to exceed the

maximum statutory sentence.

4.4 Other:

4.5 Not included in judgment and sentence form.

4.6 FIRST TIME OFFENDER WAIVER OF PRESUMPTIVE SENTENCE. RCW 9.94A.030, RCW 9.94A.120. The defendant is a first time offender. The court waives imposition of a sentence within the presumptive sentence range and imposes the following sentence:

(a) CONFINEMENT. Defendant is sentenced to the following term of total confinement in the custody of the county jail: 90 days total confinement on each count to be served concurrently. (Up to 90 days). RCW 9.94A.110. Other:_____

Confinement shall commenced immediately unless otherwise set forth here:_____

[X] PARTIAL CONFINEMENT. Defendant may serve the sentence, if eligible and approved, in partial confinement in the following programs, subject to the following conditions:_____

[ ] work crew RCW 9.94A.135
[ ] home detention RCW 9.94A.180, 190
[X] work release RCW 9.94A.180

[X] ALTERNATIVE CONVERSION. RCW 9.94A.380. 30 days of total confinement ordered above are hereby converted to

240 hours of community service (8 hours = 1 day, nonviolent offenders only, 30 days maximum) under the supervision of the Department of Corrections to be completed:

[X] on a schedule established by the defendant's community corrections officer.

[ ] as follows:_____

[ ] Alternatives to total confinement were not used because of:

[ ] criminal history [ ] failure to appear (Finding required for nonviolent offenders only) RCW 9.94A.380.

(b) COMMUNITY SERVICE. RCW 9.94A.120. In addition to the ordered total confinement, defendant shall perform _____ hours of community service to be served on each count concurrently as approved by defendant's community corrections officer and to be completed:

[ ] on a schedule established by the defendant's community corrections officer.

[ ] as follows:

(c) The defendant shall receive credit for time served prior to sentencing if the

commencement was solely under this cause number. RCW 9.94A.120. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court.

4.7 COMMUNITY SUPERVISION. RCW 9.94A.100. Defendant shall serve (up to 24 months) in community supervision. Defendant shall report to the Department of Corrections, 107 East Wall Street, Colfax, Washington 99111, (509) 397-4470 (or other location as specified by Court _____ not later than 72 hours after release from custody and the defendant shall comply with the instruction, rules and regulations of the Department for the conduct of the defendant during the period of community supervision, shall obey all laws, and shall comply with any other conditions of community supervision stated in this Judgment and Sentence:

[ ] devote time to specific employment or occupation
[X] pay all court-ordered legal financial obligations
[ ] pursue a prescribed course of secular study
[ ] remain within prescribed geographical boundaries

COMMUNITY SERVICE CONDITIONS:

1. Complete counseling as required by the C.C.O., the court does recommend anger management.
2. Obey all laws
3. Have no contact, directly or indirectly, with Leslie Cloaninger

OTHER CONDITIONS:

1. Defendant shall report to jail on 04/30/99 at 6:00 p.m.

The conditions of community supervision shall begin immediately unless otherwise set forth here:_____

V. NOTICES AND SIGNATURES

5.1 COLLATERAL ATTACK ON JUDGMENT. Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 LENGTH OF SUPERVISION. The defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations. RCW 9.94A.145.

5.3 NOTICE OF INCOME-WITHHOLDING ACTION. If the court has not ordered an immediate notice of payroll deduction in paragraph 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.200010. Other income-

withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.200030.

5.4 RESTITUTION HEARING.

[ ] Defendant waives any right to be present at any restitution hearing (sign initials):

5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.200.

5.6 FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification, to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047.

Cross off if not applicable

5.7 SEX OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200. Because this crime involves a sex offense, you are required to register with the sheriff of the county of the state of Washington where you reside. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so

if you are under the jurisdiction of this state's Department of Corrections.

If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 14 days before moving and must register again with the sheriff within 24 hours of moving. If you change your residence to a new county within this state, you must send written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving, register with that sheriff within 24 hours of moving and you must give written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington state, you must also send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington state.

5.8 OTHER:

DONE in Open Court and in the presence of the defendant this date: 04/16/99

/s/ R.J. Schroeder
JUDGE Print name: RICHARD J. SCHROEDER

/s/ J. Tobin Krauel
Deputy Prosecuting Attorney
WSBA #24100
J. TOBIN KRAUEL

/s/ Paul J. Burns
Attorney for Defendant
WSBA No. 13320

/s/ Daniel R. Antoni
Defendant
DANIEL REINHOLD ANTONI

CASE NUMBER of this case is 98-1-00052-4

I, SHIRLEY J. BAFUS, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action, now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: 04/16/99

Clerk of said County and State, by: /s/ K. Goebel, Deputy Clerk

IDENTIFICATION OF DEFENDANT

SID No.	WA 19188658	Date of Birth:	12/31/53
FBI No.	194958JB7	Local ID No.	0380013A
DOL No.:	ANTONDR471RU/WA	OCA:	
SSN:	542-66-4256	DOA:	
PCN No.		Other	

Alias name, SSN, DOB:

Race:	Ethnicity	Sex:
[ ] Asian/Pacific Islander	[ ] Hispanic	[X] Male
[ ] Black/African-American	[X] Non-Hispanic	[] Female
[X] Caucasian		
[ ] Native American		
[ ] Other:_____		

FINGERPRINTS I attest that I saw the same defendant who appeared in Court on this document affix his or her fingerprints and signature thereto. Clerk of the Court:_____ _____ Deputy Clerk Dated:_____

DEFENDANT'S SIGNATURE: /s/Daniel R. Antoni
DANIEL REINHOLD ANTONI

DEFENDANT'S ADDRESS _____

_____

Left four fingers taken simultaneously:	Left Thumb	Right Thumb
(Fingerprints)	(Thumbprint)	(Thumb print)

Right four fingers taken simultaneously:

(Fingerprints)

U.S.C.A. Const. Amendment 1:

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

RCW 9A.72.110(2)(3):

...

(2) A person also is guilty of intimidating a witness if the person directs a threat to a former witness because of the witness' role in an official proceeding.

(3) As used in this section:

(a) "Threat" means:

(i) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or

(ii) Threat as defined in RCW 9A.04.110(25).

RCW 9A.04.110(25)

"Threat" means to communicate, directly or indirectly the intent:

(a) To cause bodily injury in the future to the person threatened or to any other person;

(b) To cause physical damage to the property of a person other than the actor; or

(c) To subject the person threatened or any other person to physical confinement or restraint; or

(d) To accuse any person of a crime or cause criminal charges to be instituted against any person; or

(e) To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt or ridicule; or

(f) To reveal any information sought to be concealed by the person threatened; or

(g) To testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(h) To take wrongful action as an official against anyone or anything, or wrongfully withhold official action, or cause such action or withholding; or

(i) To bring about or continue a strike, boycott, or other similar collective action to obtain property which is not demanded or received for the benefit of the group which the actor purports to

represent; or

(j) To do any other act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition, or personal relationships.

In The Superior Court of the State of Washington

In and For the County of Whitman

STATE OF WASHINGTON	)	
	)	NO. 98-1-00052-4
Plaintiff,	)	
	)	AMENDED
vs.	)	INFORMATION FOR
	)	INTIMIDATING A
DANIEL REINHOLD	)	WITNESS (Four [4]
ANTONI,	)	Counts, Each Count
DOB: 12/31/53	)	a Class B Felony)
	)	
Defendant.	)	(Filed 10/13/98)

COMES NOW James H. Kaufman, Prosecuting Attorney for Whitman County, State of Washington, being represented by J. Tobin Krauel, Senior Deputy Prosecuting Attorney, and by this Amended Information accuses DANIEL REINHOLD ANTONI of the crime of Intimidating a Witness, four (4) counts, each count a class B-felony committed as follows:

COUNT I.

That the said DANIEL REINHOLD ANTONI on or about and between the 7th day of March, 1997 and the 21st day of April, 1997, in the County of Whitman, State of Washington, then and there being, by use of a threat against a current or prospective witness attempt to: influence the testimony of that person, induce that person to elude legal process summoning him or her to testify, or induce that person to absent himself or herself from such proceedings; to wit: by threatening to sue Dr. Roy a. Anderson if he filed a Court ordered psychological

evaluation; contrary to statute in such case made and provided, to wit: RCW 9A.72.110(1) and 9A.04.110(25), and against the peace and dignity of the State of Washington.

COUNT II.

That the said DANIEL REINHOLD ANTONI on or about and between the 20th day of March, 1997 and the 30th day of August, 1997, in the County of Whitman, State of Washington, then and there being, by use of a threat against a current or prospective witness attempt to: influence the testimony of that person, induce that person to elude legal process summoning him or her to testify, or induce that person to absent himself or herself from such proceedings: to-wit: by preparing and serving a complaint for damages for $100,000.00 against Leslie Cloaninger while she was in the process of preparing a guardian ad litem report which was ordered by the Superior Court; contrary to statute in such case made and provided, to-wit: RCW 9A.72.110(1) and 9A.04.110(25), and against the peace and dignity of the State of Washington.

COUNT III.

That the said DANIEL REINHOLD ANTONI on or about and between the 15th day of September, 1997 and the 3rd day of June, 1998, in the County of Whitman, State of Washington, then and there being, did direct a threat to a former witness because of the witness role in an official proceeding: to-wit: threaten to commence legal action against Leslie Cloaninger, to bring full force of law against her legal practice and her, to file a bar complaint against her, report her to Attorney General Office, report her to the IRS, and publicize asserted facts that she was a "dyke, a liar, and had received bribes as a witness"; contrary to statute in such case made and provided, to-wit: RCW 9A.72.110(2) and RCW 9A.04.110(25),

and against the peace and dignity of the State of Washington.

COUNT IV.

That the said Daniel Reinhold Antoni on or about May 3, 1997, in the County of Whitman, State of Washington, then and there being, by use of a threat against a current or prospective witness attempt to: influence the testimony of that person, induce that person to elude legal process summoning him or her to testify, or induce that person to absent himself or herself from such proceedings; to-wit; by threatening to commence legal action against Dr. Karie Rainer for the evaluation she completed for the Court; contrary to statute in such case made and provided, to-wit: RCW9A.72.110(1) and 9A.04.110(25), and against the peace and dignity of the State of Washington.

DATED this 13th day of October, 1998.

JAMES H . KAUFMAN,
Whitman County Prosecuting
Attorney

/s/ J. Tobin Krauel
J. TOBIN KRAUEL
Senior Deputy Prosecuting
Attorney
Attorney for Plaintiff
WSBA No. 24100

STATE OF WASHINGTON)
)
County of Whitman)

J. TOBIN KRAUEL, being first duly sworn on oath, deposes and says as follows:

That he is the duly qualified, acting and appointed Senior Deputy Prosecuting Attorney for Whitman County, State of Washington; that he has read the foregoing information, knows the contents thereof and believes the same to be true.

/s/ J. Tobin Krauel
J. TOBIN KRAUEL

SUBSCRIBED AND SWORN to before me this 13th day of October, 1998.

/s/ Brenda S. Cloninger
Clerk,
Whitman County, State of Washington

RACE:	White
Sex:	Male
DOB:	12/31/53
Ht:	5'9"
Wt:	170
Hair:	Brn
Eyes:	Brn
SSN:	542-66-4256
FBI:	Unknown
SID:	Unknown
DOL:	ANTONDR471RU/WA
LKA:	4387 Ewartsville Rd. Pullman, WA 99163

SUPERIOR COURT, STATE OF WASHINGTON,
COUNTY OF WHITMAN

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 98-1-00052-4
	)	
v.	)	DEFENDANT'S MOTION
	)	FOR NEW TRIAL
DANIEL REINHOLD	)	
ANTONI	)	(Filed 03/10/99)
	)	
Defendant.	)	

Pursuant to CrR 7.6(a)(5)(8), defendant Daniel R. Antoni respectfully moves the court for an order granting a new trial.

THIS MOTION is based on the records and files herein, and the accompanying memorandum of authorities.

DATED this 9th day of March, 1999.

PAUL J. BURNS, P.S.

/s/ By: Paul J. Burns
PAUL J. BURNS
WSBA No. 13320
Attorney for Defendant

SUPERIOR COURT, STATE OF WASHINGTON,
COUNTY OF WHITMAN

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 98-1-00052-4
	)	
v.	)	DEFENDANT'S
	)	MEMORANDUM OF
DANIEL REINHOLD	)	AUTHORITIES IN
ANTONI	)	SUPPORT OF MOTION
	)	FOR NEW TRIAL
Defendant.	)	(Filed 03/10/99)

INTRODUCTION

On January 28, 1999, a Whitman County Superior Court jury convicted defendant Daniel R. Antoni on two counts of Intimidating a Witness under RCW 9A.72.110(1), (2). Defendant now respectfully moves the court for an order granting a new trial. A new trial should be granted because the record demonstrates irregularity in the proceedings of the court by which defendant was prevented from having a fair trial. CrR 7.6(a)(5). Substantial justice has not been done. CrR 7.6(a)(8).

Specifically, a new trial should be granted for the following reasons:

(1) The jury was not properly instructed that it must unanimously agree on which of the alternative specific means of committing the crime of intimidating a witness it found defendant guilty on Count II of the information. This deprived defendant of his constitutional right to a jury trial.

Const. Art. 1 Section 21.

(2) The jury was not properly instructed that it must unanimously agree on which of the alternative specific means of committing the crime of intimidating a witness it found defendant guilty on Count III of the information. Again, this deprived defendant of his constitutional right to a jury trial. Const. Art. 1 Section 21.

(3) RCW 9A.72.110 and RCW 9A.04.110(25) are unconstitutionally overbroad and violate the First Amendment protection of freedom of speech. See, Seattle v. Ivan, 71 Wn. App. 145, 856 P.2d 1116 (1993).

(4) Defendant received ineffective assistance of counsel at trial.

FACTS

On October 13, 1998, the Whitman County prosecuting attorney filed an amended information charging defendant Antoni with four counts of Intimidating a Witness under RCW 9A.72.110 and RCW 9A.04.110(25). The charges arose out of Mr. Antoni's contacts with a court appointed guardian ad litem, and court-appointed consulting experts who were involved in a di orce/custody proceeding between defendant and his ex-wife. In Count I of the information Antoni was charged with "threatening to sue Dr. Roy A. Andersen if he filed a court-ordered psychological evaluation." Count II of the amended information charged Antoni with intimidating a

witness by serving a lawsuit on the court-appointed guardian ad litem, Ms. Leslie Cloaninger. This count expressly alleged three of the four alternative means of committing the crime of intimidating a witness set forth in RCW 9A.72.110(1). Count III charged Antoni with intimidating the court-appointed guardian ad litem by threatening her in several ways after the termination of the underlying custody proceeding in violation of RCW 9A.72.110(2) and RCW 9A.04.110(25). Finally, Count IV charged defendant Antoni with intimidating a witness by threatening, in several ways, Dr. Karen Rainier, another consulting expert in the custody proceeding.

Defendant plead not guilty to all four counts in the amended information. The case was tried to a Whitman County Superior Court jury from January 25, 1999 through January 28, 1999. The jury was unable to reach a verdict on Count I, the charge involving Dr. Andersen. The jury found Mr. Antoni guilty on Counts II and III, the charges involving alleged threats against Leslie Cloaninger, the court-appointed guardian ad litem. The jury found Mr. Antoni not guilty on Count IV, the charge involving Dr. Rainier.

Count II of the amended information alleged:

> That the said Daniel Reinhold Antoni on or about and between the 20th day of March, 1997 and the 30th day of August, 1997 in the County of Whitman, State of Washington, then and there being, by use of a threat against a current or prospective witness attempt to: influence the testimony of that person, induce that person to elude legal process summoning him or her to testify, or induce that person to absent himself or herself from such proceedings: to wit: by preparing and serving a complaint for damages for $100,000.00 against Leslie Cloaninger while she was in the process of

preparing a guardian ad litem report which was ordered by the Superior Court; contrary to statute in such case made and provided, to-wit: RCW 9A.72.110(1) and 9A.04.110(25), and against the peace and dignity of the State of Washington.

With respect to this count, the court instructed the jury as follows:

To convict the defendant of the crime of intimidating a witness as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or between March 20, 1997 and April 3, 1997, the defendant directed a threat to Leslie Cloaninger.

2. That Leslie Cloaninger was a witness or was a person the defendant had reason to believe was about to be called as a witness in any official proceeding.

3. The threat was an attempt to influence her testimony, induce her to elude legal process summoning her to testify, or induce her to absent herself from such proceeding. And,

4. The acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a

> reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

(RP 379-380). The court did not instruct the jury that it must reach a unanimous verdict on which of the alternative means set forth in Section 3 of the instruction it found Antoni guilty of.

Count III of the amended information alleged:

> That the said Daniel Reinhold Antoni on or about and between the 15th day of September, 1997 and the 3rd day of June, 1998, in the County of Whitman, State of Washington, then and there being, did direct a threat to a former witness because of the witness role in an official proceeding: to-wit: threaten to commence legal action against Leslie Cloaninger, to bring full force of law against her legal practice and her, to file a bar complaint against her, report her to Attorney General office, report her to the IRS, and publicize asserted facts that she was a "dyke, a liar, and had received bribes as a witness," contrary to statute in such case made and provided, to-wit: RCW 9A.72.110(2) and RCW 9A.04.110(25), and against the peace and dignity of the State of Washington.

With respect to Count III, the court instructed the jury as follows:

> To convict the defendant of the crime of intimidating a witness as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> 1. That on or between September 15, 1997 and June 3, 1998, the defendant directed a threat to Leslie Cloaninger, a former witness.
>
> 2. The threat was directed to her because of her role in an official proceeding. And,
>
> 3. The acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

(RP 380-381)

The court further instructed the jury on the meaning of the word "threat" in the Intimidation of a Witness statute:

> "Threat" means to communicate, directly or

> indirectly, the intent to expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt or ridicule, or to do any other act which is intended to harm substantially the threat -- person threatened or another with respect to that person's health, safety, business, financial condition, or personal relationships.

RP 382.

The court did not instruct the jury that it had to be unanimous on which of the alternative ways of "threatening" the witness it found defendant guilty of in Count III.

LEGAL ARGUMENT

1. The court's failure to instruct the jury that it must be unanimous on the specific alternative means of committing the crime it found defendant guilty on requires a new trial on Count II of the amended information.

Criminal defendants in Washington have a right to a unanimous jury verdict. Const. Art. 1 Section 21. This right includes the right to an expressly unanimous verdict. State v. Ortega Martinez, 124 Wn.2d 702, 707, 811 P.2d 231 (1994). In certain situations, the right to a unanimous jury verdict also includes the right to express jury unanimity on the means by which the defendant is found to have committed the crime. Id., at 707; State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury. Ortega Martinez, supra, at 707. If there is insufficient evidence as to any alternate means charged, the jury must be instructed that it must unanimously

agree on the specific means used to commit the crime. State v. Savaria, 82 Wn. App. 832, 840, 919 P.2d 1263 (1996).

RCW 9A.72.110(1) defines the crime of intimidating a witness. The statute outlines four alternative means of committing the crime:

> A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to:
>
> (a) Influence the testimony of that person;
>
> (b) Induce that person to elude legal process summoning him or her to testify;
>
> (c) Induce that person to absent himself or herself from such proceedings; or
>
> (d) Induce that person not to report the information relevant to a criminal investigation or the abuse or neglect of a minor child, not to have the crime or the abuse or neglect of a minor child prosecuted, or not to give truthful or complete information relevant to a criminal investigation or the

abuse or neglect of a minor child.

RCW 9A.72.110(1)

Count II of the amended information charged Mr. Antoni with intimidating a witness and set forth three of the alternate means of committing the crime: (a) influencing the testimony of a person; (b) inducing that person to elude legal process summoning him or her to testify, and (c) inducing that person to absent himself or herself from "such proceedings." The court's instruction to the jury regarding Count II mirrored the language of the amended information and set forth these three alternative means of committing the crime.

There was no evidence at trial to support a finding that defendant Antoni attempted to "influence the testimony" of Ms. Cloaninger. There certainly was no evidence at trial to support a finding that Antoni attempted to induce Ms. Cloaninger to elude legal process summoning her to testify. There was insufficient evidence to support a conviction on these alternate means of committing the crime.

If there is insufficient evidence as to any alternate means charged, the jury must be instructed that it must unanimously agree on the specific means used to commit the crime. State v. Savaria, supra. In the present case, the trial court did not instruct the jury on unanimity with respect to the specific means used to commit the crime. Absent the unanimity instruction, defendant Antoni was deprived of his constitutional right to an expressly unanimous verdict. Const. Art. 1 Section 21. A new trial is required with respect to Count II.

2. The court's failure to instruct the jury that unanimity was required with respect to the specific means of committing the crime charged in Count III requires reversal and a new trial.

Count III of the information charged Mr. Antoni with intimidating a witness under RCW 9A.72.110(2) and RCW 9A.04.110(25). Under RCW 9A.72.110(2) a person is guilty of intimidating a witness "if the person directs a threat to a former witness because of the witness' role in an official proceeding." RCW 9A.04.110(25) defines the term "threat" for purposes of the witness intimidation statute. The definitional statute sets forth 10 alternative meanings of the term "threat." In the present case, the court instructed the jury with respect to two of the alternative definitions of the term "threat":

> "Threat means to communicate, directly or indirectly the intent:
>
> . . .
>
> (e) To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule; or
>
> . . .
>
> (j) To do any other act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition, or personal relationships;
>
> . . .

(RP 382; See RCW 9A.04.110(25)(e), (j).)

Specifically, Count III of the information alleged that defendant Antoni intimidated Ms. Cloaninger as a <u>former</u>

witness in several different ways, including threatening legal action against her, threatening to file a bar complaint against her, threatening to report her to the IRS, and threatening to publicize a variety of asserted facts against her. With respect to Count III, the court instructed the jury as follows:

> To convict the defendant of the crime of intimidating a witness as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> 1. That on or between September 15, 1997 and June 3, 1998, the defendant directed a threat to Leslie Cloaninger, a former witness.
>
> 2. The threat was directed to her because of her role in an official proceeding. And,
>
> 3. The acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

RP 380-381.

To convict Mr. Antoni of the charge set forth in Count

III, the jury had to find that he "threatened" Ms. Cloaninger in one of the ways alleged. The instruction defining the term "threat" provided the jury with two alternate ways in which defendant could have committed the crime charged with respect to each separate factual allegation. These two alternative ways of threatening the former witness included: (1) communicating the intent to expose a secret or publicize an asserted fact tending to subject any person to hatred, contempt or ridicule, or (2) doing "any other act which is intended to harm substantially the person threatened or another with respect to that person's health, safety, business, financial condition, or personal relationship." (RP 382). This two-prong definition of the term threat outlined two alternative ways in which Mr. Antoni could have committed the crime of intimidating the former witness. The jury was not instructed that it must be unanimous with respect to which of those alternative means of committing the crime it found Antoni guilty of.

The court was careful to provide a special verdict form with respect to Count III which required jury unanimity on the specific factual allegation it found supported conviction for witness intimidation. On this special verdict form, the jury found Mr. Antoni threatened to commence legal action against Ms. Cloaninger via a letter dated September 15, 1997. It also found that Antoni threatened Ms. Cloaninger on June 3, 1998 by filing a lis pendens. However, with respect to these two findings, the verdict is silent concerning whether Antoni's threat was in the form of an intent to expose a secret, or to do some other act intended to substantially harm the victim.

There is no evidence to support a finding that the September 15, 1997 letter to Ms. Cloaninger, which allegedly "threatened" legal action, communicated the intent to expose or publicize a secret or asserted fact tending to subject Ms. Cloaninger to hatred, contempt or ridicule. If there is insufficient evidence as to any alternate means charged, the

jury must be instructed that it must unanimously agree on the specific means used to commit the crime. State v. Savaria, supra. The failure to instruct the jury in this case that it must be unanimous with respect to the specific means of "threatening" the victim that it found Mr. Antoni guilty of requires a new trial.

3. RCW 9A.72.110(1) is unconstitutionally overbroad.

Defendant Antoni was convicted of intimidating a witness on Count II of the information under RCW 9A.72.110(1). This statute provides:

> A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to:
>
> (a) Influence the testimony of that person;
>
> (b) Induce that person to elude legal process summoning him or her to testify;
>
> (c) Induce that person to absent himself or herself from such proceedings; or
>
> (d) Induce that person not to report the information relevant to a criminal investigation or the abuse or neglect of a minor child, not to have the crime or the

> abuse or neglect of a minor child prosecuted, or not to give truthful or complete information relevant to a criminal investigation or the abuse or neglect of a minor child.

Section 3 of the statute sets forth multiple definitions of the term "threat," and expressly incorporates the 10 definitions of the term "threat" outlined in RCW 9A.04.110(25).

The "threat" which supported the witness intimidation charge in Count II of the information was Mr. Antoni's act of invoking the legal process by serving a Summons and Complaint on the court-appointed guardian ad litem. This illustrates the sweeping scope of RCW 9A.72.110(1), and demonstrates that the statute is unconstitutionally overbroad.

A criminal statute that "sweeps constitutionally protected free speech activities within its prohibitions" may be overbroad and thus violates the First Amendment. State v. Stephenson, 89 Wn. App. 794, _____ P.2d _____ (1998). In considering an overbreadth challenge, the court must consider whether the challenged statute reaches constitutionally protected speech or expression and whether it prescribes a real and substantial amount of speech. If the answer to those two questions is yes, the court must strike the statute as overbroad unless the regulation of protected speech is constitutionally permissible or it is possible to limit the statute's construction so that it does not unconstitutionally interfere with protected speech. City of Seattle v. Huff, 111 Wn.2d 923, 925, 767 P.2d 572 (1989).

The First Amendment generally prohibits government interference in speech or expressive conduct. State v. Halstein, 122 Wn.2d 109, 121, 857 P.2d 270 (1993). "True threats" do not

enjoy constitutional protection. State v. Stephenson, supra, at 800-801. A "true threat" is one where a reasonable person would foresee that the listener will believe she will be subject to physical violence upon her person. Stephenson, supra, at 801. In the present case, Mr. Antoni did not threaten physical harm to anyone, and he was not charged with doing so. The allegation in Count II was that Antoni threatened the court appointed guardian ad litem by serving her with a Summons and Complaint, purportedly a threat under RCW 9A.04.110(25)(e)(j). Antoni's "threat" was speech, not a true threat, and was therefore entitled to First Amendment protection. Stephenson, supra, at 801.

In Seattle v. Ivan, 71 Wn. App. 145, 856 P.2d 1116 (1993), the Court of Appeals considered an overbreadth challenge to a Seattle "coercion" ordinance substantially similar to RCW 9A.72.110(1) and RCW 9A.04.110(25). The Seattle coercion ordinance provided that a person is guilty of "coercion" if by use of a threat he compelled another to engage in conduct which the latter had a right to abstain from, or to abstain from conduct which he had a right to engage in. The Seattle ordinance then defined the term "threat" in terms identical to the definitions set forth in RCW 9A.72.110 and RCW 9A.04.110(25). The Ivan court held that the Seattle ordinance was unconstitutionally overbroad, and explained:

> The City argues that the "societal need for this law" justifies its incidental effect on free speech, arguing that it does not prohibit the acts set forth in SMC 12A.08.050(L) unless accomplished by threat. But as recognized in Claiborne, even coercive speech is protected under the First Amendment. The effect of the Seattle ordinance on speech is more than incidental; it could potentially prohibit a real and substantial amount of protected speech. The City claims it has a compelling interest in

> protecting its citizens from extortion-like threats, yet the ordinance is not so narrowly defined and prohibits many communications besides those extortionate in nature. Accordingly, the ordinance is overbroad on its face.

71 Wn. App., at 153-154.

The statutory prohibitions of threats in RCW 9A.72.110(1) and RCW 9A.04.110(25) are similarly overbroad. On their face, they prohibit a wide variety of speech and/or expression which is certainly constitutionally protected. The statute would prohibit a witness in a civil or criminal proceeding from offering testimony which would attack the character or credibility of another witness with adverse testimony. The statute ostensibly would limit the press from reporting on a witness' background and character, a substantial limitation on the freedom of the press. And, as in this case, the statute purportedly prohibits access to the courts through issuance of a Summons and Complaint.

Under the court's analysis in Ivan, supra, RCW 9A.72.110(1) and RCW 9A.04.110(25) are unconstitutionally overbroad in violation of the First Amendment. Defendant Antoni's conviction under these statutes on Count II of the information is unconstitutional. The conviction should be reversed, and the charges alleged in Count II should be dismissed.

4. RCW 9A.72.110(2) is unconstitutionally overboard.

Defendant was convicted on Count III of the amended information under RCW 9A.72.110(2). This statute provides:

> A person is guilty of intimidating a witness if the persor directs a threat to a former witness because of the witness' role in an official

proceeding.

Again, the statute incorporates the definitions of threat in RCW 9A.04.110(25). The overbreadth analysis with respect to this statute is even more compelling. The effect of this statute is to silence people and prohibit any criticisms of a witness who has testified in a prior proceeding. There are essentially no limits on the prohibition of criticisms of a witness who has testified in a prior proceeding. Clearly, RCW 9A.72.110(2) is unconstitutionally overbroad.

Again, the threats prohibited by RCW 9A.72.110(2) and RCW 9A.04.110(25) have nothing to do with physical harm, and are therefore not "true threats." State v. Stephenson, supra. The "threats" prohibited by these statutes involve speech and expression and are therefore entitled to First Amendment protection. State v. Knowles, 91 Wn. App. 367, 957 P.2d 797 (1998).

There simply are no limits on the prohibitions of speech adverse to, or critical of a witness in a former proceeding proscribed by RCW 9A.72.110(2) and RCW 9A.04.110(25). These statutes prohibit exposing a secret or publicizing an asserted fact, whether true or false tending to subject any person to hatred, contempt or ridicule because that person testified in a former proceeding. RCW 9A.04.110(25)(e). They prohibit "any other act which is intended to harm substantially the person threatened with respect to his health, safety, business, financial condition, or personal relationships" because the person testified as a witness in a former proceeding. RCW 9A.04.110(25)(j). The statute on its face prohibits press criticism of a witness because of that witness' testimony in an official proceeding. This is clearly an unconstitutional infringement on the freedom of the press. The statute prohibits one from initiating a civil action for defamation, or malicious prosecution premised on a witness' testimony in a former proceeding. The statute would prohibit

one from writing a letter to the editor of a newspaper severely criticizing and challenging the honesty/credibility of a witness who testified in an official proceeding. There simply are no limits to the infringement on free speech rights imposed by RCW 9A.72.110(2) and RCW 9A.04.110(25).

Defendant Antoni was convicted of intimidating a witness on Count III of the amended information under RCW 9A.72.110(2) and RCW 9A.04.110(25). These statutes are clearly constitutionally overbroad. Defendant's conviction on Count III was premised on an unconstitutional statute and violated his rights of freedom of speech guaranteed by the First Amendment, and Article 1, Section 5 of the Washington Constitution. The conviction on Count III should be overturned and the charges dismissed.

RESPECTFULLY SUBMITTED this 9th day of March, 1999.

PAUL J. BURNS, P.S.

/s/ By: Paul J. Burns
PAUL J. BURNS
WSBA No. 13320
Attorney for Defendant

NO. 19158-3-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent

v.

DANIEL REINHOLD ANTONI,

Appellant

PETITION FOR REVIEW

PAUL J. BURNS
North 1212 Washington
Suite 224
Spokane, WA 99201
(509) 327-2213
Attorney for Appellant

(Filed 10/13/00)

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A. IDENTITY OF PETITIONER

Appellant Daniel R. Antoni, petitions the Supreme Court for review of the decision of Division III of the Court of Appeals in State v. Antoni, Court of Appeals No. 19158-3-III.

B. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks Supreme Court review of the decision of Division III of the Court of Appeals in State v. Antoni, Court of Appeals No. 19158-3-III, filed on September 14, 2000.

C. ISSUES PRESENTED FOR REVIEW

Whether RCW 9A.72.110(2) is unconstitutionally overbroad in violation of the First Amendment to the United States Constitution?

D. STATEMENT OF THE CASE

On October 13, 1998, the Whitman County Prosecuting Attorney filed an Amended Information charging petitioner Daniel R. Antoni with four counts of Intimidating a Witness under RCW 9A.72.110. (CP 58-61). The charges arose out of Mr. Antoni's contacts with a court-appointed guardian ad litem, and court-appointed consulting experts who were involved in a divorce/custody proceeding between petitioner and his ex-wife. (CP 55-57, 62-63). Following a three-day trial, the jury convicted Mr. Antoni on Counts II and III of the Amended Information. (CP 267-271).

Petitioner appealed to Division III of the Court of Appeals. With respect to his conviction on Count II, Antoni argued that the trial court erred in failing to instruct the jury regarding unanimity relative to the alternative means to commit the crime with which he was charged. See State v. Ortega-Martinez, 124 Wn.2d 702, 881 P.2d 231 (1994); State v. Savaria, 82 Wn. App. 832, 919 P.2d 1263 (1996). With respect to Count III, petitioner argued that RCW 9A.72.110(2) is unconstitutionally overbroad in violation of the First

Amendment to the United States Constitution.

On September 14, 2000, Division III of the Court of Appeals reversed Mr. Antoni's conviction on Count II, holding that the trial court erred in failing to instruct the jury that it must be unanimous regarding which of the alternative means Mr. Antoni employed in intimidating the witness. However, the Court of Appeals affirmed Antoni's conviction on Count III, rejecting his First Amendment overbreadth challenge to RCW 9A.72.110(2). See State v. Antoni, Court of Appeals No. 19158-3-III. Petitioner now seeks Supreme Court review of the Court of Appeals decision affirming his conviction on Count III.

Count III of the Amended Information charged Antoni with intimidating a witness in violation of RCW 9A.72.110(2). This statute prohibits a variety of conduct designed to threaten a former witness because of that witness' role in an official proceeding. The statute prohibits "threats" against the former witness after the witness has already testified in an official proceeding. Therefore, by its terms, the statute is not designed or intended to protect a witness from intimidation prior to testifying.

Because RCW 9A.72.110(2) prohibits threats designed to intimidate a former witness because of prior testimony, it does not serve the governmental interest in protecting witnesses in judicial and official proceedings. Therefore, as more fully explained below; RCW 9A.72.110(2) is unconstitutionally overbroad in violation of the First Amendment.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. RCW 9A.72.110(2) Is Not Narrowly Tailored To Meet A Compelling Governmental Interest, And Is Therefore Unconstitutionally Overbroad.

RAP 13.4(b)(3) provides that a Petition for Review will be accepted by the Supreme Court if a significant question of law under the constitution of the United States is involved. The issue presented in the case at bar is whether RCW 9A.72.110(2) is unconstitutionally overbroad in violation of the First Amendment. Supreme Court review is therefore appropriate.

In general, the First Amendment prevents the government from proscribing speech or expressive conduct. R.A.V. v. City of St. Paul, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). Overbreadth analysis is intended to ensure that legislative enactments do not prohibit constitutionally protected speech. City of Tacoma v. Luvene, 118 Wn.2d 826, 827 P.2d 1374 (1992). A criminal statute that proscribes constitutionally protected free speech activities may be overbroad, and thus violate the First Amendment to the United States Constitution. State v. Knowles, 91 Wn. App. 367, 957 P.2d 797 (1998).

In a facial challenge to the overbreadth of a law, the court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. City of Houston v. Hill, 482 U.S. 451, 107 S.Ct. 2502, 2508, 96 L.Ed.2d 398 (1987). Criminal statutes must be scrutinized with particular care; "those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." Id.

RCW 9A.72.110 provides in relevant part:

...

(2) A person also is guilty of intimidating a witness if the person directs a threat to a former witness because of the witness' role in an official proceeding.

(3) As used in this section:

(a) "Threat" means:

(i) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or

(ii) Threat as defined in RCW 9A.04.110(25).

RCW 9A.04.110(25) provides:

"Threat" means to communicate, directly or indirectly the intent:

(a) To cause bodily injury in the future to the person threatened or to any other person;

(b) To cause physical damage to the property of a person other than the actor; or

(c) To subject the person threatened or any other person to physical confinement or restraint; or

(d) To accuse any person of a crime or cause criminal charges to be instituted against any person; or

(e) To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt or ridicule; or

(f) To reveal any information sought to be concealed by the person threatened; or

(g) To testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(h) To take wrongful action as an official against anyone or anything, or wrongfully withhold official action, or cause such action or withholding; or

(i) To bring about or continue a strike, boycott, or other similar collective action to obtain property which is not demanded or received for the benefit of the group which the actor purports to represent; or

(j) To do any other act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition, or personal relationships.

In the instant case, the Court of Appeals properly held that Mr. Antoni's "threats" to initiate legal action against the guardian ad litem were not "true threats" of bodily harm, but rather were threats of a financial or business nature, and were therefore entitled to First Amendment protection. State v. Antoni, Slip. Op., at 10-11, citing State v. Stephenson, 89 Wn. App. 794, 801, 950 P.2d 38, review denied, 136 Wn.2d 1018 (1998). The government may regulate protected speech by view-point neutral, reasonable time, place and manner restrictions. City of Seattle v. Ivan, 71 Wn. App. 145, 152, 856 P.2d 1116 (1993). The Court of Appeals also properly characterized the speech at issue in the instant case as "private speech." State v. Antoni, supra, at 11. Private speech may be regulated if the distinctions drawn are reasonable in light of the purpose of the statute and if they are view-point neutral. City of Seattle v. Eze, 111 Wn.2d 22, 32, 759 P.2d 366 (1988).

The Court of Appeals then erred in applying these overbreadth principles to RCW 9A.76.110(2). In ruling that the statute is sufficiently narrowly tailored to withstand the

overbreadth attack, the Antoni court observed at p. 12:

> In this case, the threat must be made with the intent to produce a particular result, i.e., influence testimony, induce the witness to elude the legal process, or induce the witness to avoid the hearing.

With this observation, the Antoni court construed the wrong statute. The "tailoring" language referenced -- "influence testimony, induce the witness to elude legal process, or induce the witness to avoid the hearing" - is found in RCW 9A.76.110(1)[1]. However, this is not the statute at issue

---

[1]RCW 9A.72.110(1) provides in relevant part:

> A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to:
>
> (a) Influence the testimony of that person;
>
> (b) Induce that person to elude legal process summoning him or her to testify;
>
> (c) Induce that person to absent himself or herself from such proceedings;

in this case. Mr. Antoni was convicted on Count III of intimidating a former witness in violation of RCW 9A.76.110(2). The Court of Appeals erred in this case by construing the wrong statute.

RCW 9A.76.110(2) prohibits "threats" against former witnesses because of their prior testimony in proceedings which have previously taken place. It is precisely because the statute is not "tailored" or intended to produce a particular result, i.e., preventing influence of testimony to be given, that it does not serve any compelling governmental interest and in fact proscribes constitutionally protected speech. The statute simply prohibits citizens from expressing vigorous and vehement disagreement with a witness who testifies in an official proceeding. This is tantamount to prohibiting vigorous debate over the content of a witness' testimony.

The facts in the instant case clearly illustrate the serious constitutional problem presented by the broad, virtually unlimited scope of RCW 9A.72.110(2). The Court of Appeals described Antoni's conduct or speech for which he was convicted on Count III under RCW 9A.72.110(2):

> After the trial, Mr. Antoni again wrote Ms. Cloaninger a letter on September 15, 1997. In that letter, Mr. Antoni states in part:
>
> > Finally, your report along with your testimony show that you will stoop to any lie to get YOUR results. You are FIRED as an incompetent GAL for my daughter, Meghan Antoni, IMMEDIATELY. . . .
> >
> > Legal action will commence upon you in the near future.

> Contrary to GAL immunity laws, you have overstepped your authority. I will exhaust ALL my financial resources to bring the full force of [the] law against you and your unlawful legal practice and that of a so called Guardian Ad Litem.

On December 22, 1997, Mr. Antoni informed Ms. Cloaninger's secretary that he was filing a bar complaint and a complaint against her with the Attorney General's office. . . .

. . . Mr. Antoni filed a "Lis Pendis [sic] and Declaration of Dan R. Antoni, "stating "[a] lis pendis [sic] action will be filed against Leslie A.M. Cloaninger and John Doe Cloaninger in the near future." That document stated in part:

> It is absolutely clear by the GAL, Leslie A.M. Cloaninger, that Ms. Cloaninger was biased against the Respondent and would do anything in her power to deceive and mislead the Court. She lied under oath. She mis-represented [sic] facts. She conducted a one sided [sic] investigation. . . She violated her duties as an officer of the court. I ask a number of questions. <u>These are NOT Statements</u>. Why did she do all of the above? Did she have a

> sexual relationship with my ex-wife??? Was she bribed??? One may only guess after she ignored all the expert evidence?

State v. Antoni, supra, slip. op., at 3-4.

The U.S. Supreme Court has recognized that "speech is often provocative and challenging . . . but it is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131 (1949). Mr. Antoni's post-proceeding threats of litigation against the court-appointed guardian ad litem may have been in deplorable taste. However, those "threats" represented constitutionally protected speech. RCW 9A.76.110(2) operates to preclude public debate generated as a result of a witness' former testimony in a previously conducted official proceeding. There is no legitimate governmental interest in this. The statute strikes at the heart of the First Amendment. It is unconstitutionally overbroad and should be struck down.

F. CONCLUSION

Petitioner respectfully requests this court to accept review and reverse his conviction on Count III of the Amended Information because RCW 9A.76.110(2) is unconditionally overbroad in violation of the First Amendment.

RESPECTFULLY SUBMITTED this 12th day of October, 2000.

PAUL J. BURNS, P.S.

By:/s/ Paul J. Burns
PAUL J. BURNS
WSBA No. 13320
Attorney for Petitioner

CERTIFICATE OF MAILING

The undersigned, under penalty of perjury, certifies that on the 13th day of October, 2000, copies of the Petition for Direct Review to the Supreme Court in the above-entitled matter were prepared properly and sent by prepaid, first-class mail to the following individual:

J. Tobin Krauel
Whitman County Prosecutor's Office
PO Box 30
Colfax, WA 99111

DATED this 13th day of October, 2000.

/s/ Julie M. Fluno
JULIE M. FLUNO
Legal Assistant